

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 48 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

CHATURBHAI KHIMJIBHAI MISTRY

Versus

HARSHADRAY GANDALAL JOSHI

Appearance:

MR VC DESAI for Petitioner

MS SONAL D VYAS for Respondent No. 1

CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 18/07/97

ORAL JUDGEMENT

1. This Civil Revision Application is directed against the judgment and order in Civil Misc. Application No.3 of 1989, filed by present petitioner (original defendant No.2) for restoration of possession of the suit premises against the present opponents under section 144 of the Code of Civil Procedure, which order came to be confirmed in Civil Revision Application No.8 of 1989, by the learned Extra Assistant Judge, Ahmedabad

(Rural), by judgment and order dated 15th March, 1991. The petitioner, who is original defendant No.2, is aggrieved by such orders and, hence, the present Civil Revision Application is filed.

2. This case has a little chequered history and large number of proceedings and outcome thereof are required to be stated and, therefore, the facts, in brief, are stated hereunder :-

(i) The immovable property bearing survey No.787 situated at Pandya Fali, at Viramgam, belonged to Chaturbhai Khimjibhai Mistry, present petitioner, who was defendant No.2 in the proceeding. The ground floor portion of the said premises bearing Municipal Census No.1/9/41 and the first floor thereof bearing Municipal Census No.1/9/40 also belonged to the present petitioner. Opponent No.2 in the present proceeding-Dahyalal Khimjibhai Mistry happens to be the brother of the petitioner, who has expired during the pendency of this proceeding and it is the case of the petitioner that he has no right whatsoever in the said property. It is the case of the petitioner that his brother, opponent No.2 herein, in collusion with Harshadray Gandadal Joshi, got instituted a suit by the said Harshadray Gandadal Joshi, being Regular Civil Suit No.102 of 1983 in the Court of learned Civil Judge (J.D.), Viramgam, against the present petitioner. In such suit, the said Harshadray Joshi, inter alia, averred that the ground floor portion of the premises has been let out to him by opponent No.2-Dahyalal Khimjibhai Mistry and that since present petitioner was trying to disturb his possession, he applied for injunction. Initially, ad-interim injunction was granted by the Trial Court and was also confirmed, against which the present petitioner preferred Misc. Civil Appeal 155 of 1984 and by judgment and order dated 19th October, 1985, the learned Extra Assistant Judge, Ahmedabad (Rural), at Narol, allowed the appeal and vacated the order passed by the Trial Court.

(ii) Under the guise of ad-interim injunction, which was granted by the Trial Court, Harshadray G. Joshi, opponent No.1 herein, entered into possession of the suit premises and in view of the judgment and order dated 19th October, 1985, the present petitioner made an application at Ex.112, under Section 144 of the Code of Civil Procedure, for restoration of possession of the suit premises.

(iii) Having realised this fact, the plaintiff of Civil Suit No.102 of 1983, namely, Harshadray G. Joshi,

withdrew Civil Suit No.102 of 1983.

(vi) In this situation, the present petitioner-original defendant No.2 filed Civil Misc. Application No.3 of 1989 in the Court of Civil Judge (J.D.), Viramgam against the present opponents under Section 114 of the Code of Civil Procedure for seeking the relief of restitution of possession of the suit premises. Such application was resisted by the opponents by filing written statements at Ex.19 and 20. Their main defence was that the application was not maintainable. The defence of opponent No.1, namely, Harshadray G. Joshi, plaintiff of Civil Suit No.102 of 1983, was that the suit premises have been let out to him by Dahyalal Khmjibhai Mistry, opponent No.2 herein and defendant No.1 in the original suit and that, as he has got railway quarter, he has vacated the suit premises by handing over possession to opponent No.2-Dahyalal Mistry.

(v) Opponent No.2 contended that he is the co-owner of the suit property along with the present petitioner and application under Section 144 of the Code of Civil Procedure was not maintainable by petitioner alone and he, therefore, claimed that the Civil Misc. Application No.3 of 1989 which was filed by the present petitioner for restoration of possession under Section 144 was liable to be dismissed.

(vi) By judgment and order dated 30th September, 1989, learned Civil Judge (J.D.), Viramgam, dismissed the said application of the petitioner for restoration.

(vii) Being aggrieved thereby, present petitioner preferred Civil Revision Application No.8 of 1989 before the Appellate Court and by judgment and order dated 15th March, 1991, the learned Second Extra Assistant Judge, Ahmedabad (Rural), at Narol, dismissed such revision application.

3. It is against such judgment and order of the learned Extra Assistant Judge, Ahmedabad (Rural) that the present Civil Revision Application is filed. Mr. Viresh Desai, learned counsel appearing for the petitioner, has raised number of contentions for the consideration of this Court for setting aside the judgment and order of the Trial Court and for restoring the possession of the premises and/or in the alternative, for any appropriate order, so that justice could be done to the petitioner, who has been deprived of his property.

4. Ms. Sonal Vyas, who appears for respondent No.1

on the record of this Court and who appears to have been appointed by the Legal Aid Committee, has not been in a position to assist the Court effectively. The Civil Revision Application is of the year 1993 and I see no reason whatsoever to wait and grant further time to the Legal Aid Committee.

5. Having gone through the judgment and order of the learned Second Extra Assistant Judge, Ahmedabad (Rural), at Narol, in Civil Revision Application No.8 of 1989 and the order of the learned Civil Judge (J.D.), Viramgam, in Civil Misc. Application No.3 of 1989 for restoration of possession under Section 144 of the Code of Civil Procedure, there is no manner of doubt that both the Courts below have proceeded to decide the proceedings based on some documents which are simply marked and not exhibited. Some of the documents are really important which would help either side in establishing its case for restoration of possession or non-restoration thereof. But both the Courts below had forgotten the provisions of the Evidence Act and have totally misdirected themselves in relying upon the documents which were simply marked and not exhibited by regular proof thereof, as they are required to be proved and exhibited under the provisions of the Evidence Act. Though the submissions of Mr. V.C. Desai, prima facie, appear to be well founded in law, he cannot run away from the fact that the documents to which the Courts below have made reference are not proved and/or are not exhibited as is required to be done under the provisions of the Evidence Act. In that view of the matter, the judgment and order of the Courts below are required to be quashed and set aside and the application for restoration, being Civil Misc. Application No.3 of 1989, is required to be remanded to the Trial Court with direction to record, if permissible and necessary, and to exhibit the documents on which the parties want to place reliance, in case such documents are legally proved and, thereafter, to proceed to decide the application for restoration under Section 144 of the Code of Civil Procedure. Mr. V.C. Desai is also right in contending that both the Courts below have erred in observing that the observations made in interlocutory proceedings will not apply to the application for restoration and reference to section 144 of Code of Civil Procedure has an answer to this approach of the lower Courts. The lower Courts may, therefore, take into consideration the observations made and decide the proceeding under Section 144 in accordance with law and the observations made hereinabove. The Trial Court is directed to expedite the hearing and to preferable decide the application under Section 144 by 31st January, 1998.

6. In the result, this Civil Revision Application succeeds to the aforesaid extent. Rule is partially made absolute. There shall be no order as to costs.

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